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In The

Supreme Court of the United States

October Term 1973

No. 73-1131

IN THE MATTER OF: SAMUELS & CO., INC., Bankrupt
JAMES S. MAHON, Trustee, and
C.I.T. CORPORATION,

Petitioners

v.

CURTIS R. STOWERS, ET AL,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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JAMES S. MAHON, Trustee, and
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CURTIS R. STOWERS, ET AL,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the above case on August 20, 1973.

OPINIONS BELOW

The Judgment of the Referee in Bankruptcy for the Northern District of Texas entered on the 29th day of September, 1971 and the Order with respect to the Petition to Review a Judgment of the Referee in Bankruptcy entered on the 24th day of March, 1972 are unreported and are set forth at pages 8-11 and pages 30-33, respectively, of the Mimeograph Appendix filed with the United States Court of Appeals for the Fifth Circuit (referred to herein as the "Mimeograph Appendix") which Mimeograph Appendix has been transmitted by the Clerk of that Court to the Clerk of this Court. The Opinion of the United States Court of Appeals for the Fifth Circuit and the Order Denying a Petition for Rehearing En Banc by such Court appear in Appendix "A" hereto. The Opinion is reported at 483 F.2d 557 (5th Cir. 1973).

JURISDICTION

The judgment of the Court of Appeals was entered on August 20, 1973. The denial of a timely petition for rehearing en banc was entered on October 31, 1973. This petition for certiorari is filed within ninety (90) days of that date. The Jurisdiction of this Court is invoked under 28 U.S.C.A. §1254(1).

QUESTIONS PRESENTED[1]

(1) Do the provisions of the Packers and Stockyards Act ("Act"), 7 U.S.C.A. §181 et seq., and regulations issued thereunder, 9 C.F.R. 201.43 and 201.99, preempt commercial law of the states, in particular the provisions of the Uniform Commercial Code ("Code") with respect to secured transactions?

(2) Do the provisions of the Act and Regulations 201.43 and 201.99 issued thereunder override the powers of a trustee in bankruptcy afforded by sections 67(c)(1)(B) and 70(c) of the Bankruptcy Act, 11 U.S.C.A. §107(c)(1)(B) and §110(c), respectively, and thereby create a special class of priority creditor not contemplated by the Bankruptcy Act?

(3) Under what circumstances may a Court by implication construe Federal regulations so as to override state law when such regulations do not expressly provide for the same? Specificially, do the Act and Regulations 201.43 and 201.99 issued thereunder create by implication a special fiduciary relationship between a meat packer and cattle sellers?

(4) Assuming the Act and Regulations 201.43 and 201.99 issued thereunder do create a fiduciary relationship, do they

1. In the opinion rendered by the Fifth Circuit in this case, the majority, in effect, concedes that if the provisions of the Texas Business and Commerce Code (the Texas Uniform Commercial Code) and the appropriate provisions of the Bankruptcy Act, 11 U.S.C.A. §107(c)(1)(B) and §110(c), were applicable to the facts of this case and not modified by the provisions of the Packers and Stockyards Act, 7 U.S.C.A. §181 et seq., and Regulations 201.43 and 201.99 issued thereunder, the Petitioners would have prevailed below.

confer authority upon a Court to order a party to pay so-called "trust proceeds" to an alleged beneficiary without a finding that such party ever had or received such "trust proceeds"?

STATUTES INVOLVED

The pertinent provisions of the Act. 7 U.S.C.A. §191-195, regulations issued thereunder, 9 C.F.R. 201.43(b) and 201.99, the Bankruptcy Act, 11 U.S.C.A. §107(c)(1)(B) and §110(c) and the Code, Texas Business and Commerce Code §1.201(32), (33), (34) and (37), §2.326, §2.401, §2.403, §2.702(b), §2.702(c), §9.107 and §9.312(c), are set forth in Appendix "B" hereto.

STATEMENT OF THE CASE

Unless otherwise specified in this Petition, the following references will be used:

1. "Bankrupt" refers to Samuels & Co., Inc., the meat packing company that is the Bankrupt in this proceeding.

2. "Certificate of Review" refers to the certificate of the Honorable Elmore Whitehurst, Referee in Bankruptcy, submitted in connection with a review of his Judgment dated September 29, 1971, such certificate appearing in the Mimeograph Appendix at pages 18-29.

3. "C.I.T." refers to C.I.T. Corporation, one of the Petitioners herein and the principal secured creditor of the Bankrupt.

4. "Opinion" refers to the opinion of the United States Court of Appeals for the Fifth Circuit, such opinion being the subject of this Petition and appears in Appendix "A" hereto.

5. "Order" refers to the Order with Respect to the Petition to Review a Judgment of the Referee in Bankruptcy, entered on November 24, 1972 by the United States District Court for the Northern District of Texas, such Order appearing in the Mimeograph Appendix at pages 30-40.

6. "Petitioners" refer collectively to C.I.T. and James S. Mahon, Trustee of the Bankrupt.

7. "Respondents" refer to the parties that initially filed a Petition to Reclaim Property or Payment and are cattle sellers who sold cattle to the Bankrupt on a "grade and yield" basis.

8. "Trustee" refers to James S. Mahon, Trustee of the Bankrupt and one of the Petitioners herein.

The controversy between the parties hereto was initially considered by the Referee in Bankruptcy in the Matter of Samuels & Co., Inc. in connection with a Petition and Class Action for Cattle Sellers to Reclaim Property or Payment. After hearing, the Referee entered a Judgment

that C.I.T. pay the Trustee a sum sufficient to pay cattle sellers who sold cattle to the Bankrupt on a "grade and yield" basis and that the Trustee forthwith pay over such sum to the Respondents. C.I.T. and the Trustee duly perfected their appeal from such Judgment to the United States District Court by the filing of a Petition to Review Judgment. The Referee in Bankruptcy thereafter duly prepared and filed his Certificate of Review with the United States District Court. The preliminary statement and the findings of fact contained in the Certificate of Review were unchallenged and no additional evidence was presented to the United States District Court, and the findings of fact of the Referee were duly adopted by the United States District Court in its Order. The United States District Court reversed the Judgment of the Referee and held that the conclusions of the Referee were contrary to the law under the facts of the case and held that the Respondents recover nothing of or from the Trustee and/or C.I.T. The Respondents duly perfected their appeal to the United States Court of Appeals for the Fifth Circuit, and such Court in the Opinion reversed the District Court and ordered that the Judgment of the Referee be reinstated.

A complete statement of the facts can be found in the Certificate of Review appearing in the Mimeograph Appendix at pages 18-29. However, the material facts can be summarized briefly as follows:

> Under the provisions of the Code, C.I.T. held a duly perfected security interest in all livestock, animal car-

casses, packaged and unpackaged meat, packaging material and other inventory owned by the Bankrupt or in which the Bankrupt may have had an interest, together with all accounts receivables and other collateral.

Respondents had for years sold livestock to the Bankrupt on a "grade and yield" basis. Under a grade and yield sale, the livestock are delivered to the meat packer for slaughter and, after the carcasses are allowed to chill for twenty-four hours, they are graded by the United States Department of Agriculture and the price is determined. The livestock are then weighed and the meat packer issues a check in payment. In this case, the grade and yield had been determined with respect to all of Respondents' livestock and checks were issued by the Bankrupt. Bankruptcy intervened and the checks issued to the Respondents were dishonored. None of the Respondents retained a perfected security interest in the livestock delivered to the Bankrupt under provisions of the Code or in any other manner.

At the time of the filing of the petition initiating the Bankruptcy proceeding, the Trustee became vested with all of the rights and powers granted to a trustee under the provisions of sections 67(c)(1)(B) and 70(c) of the Bankruptcy Act, 11 U.S.C.A. §107(c)(1)(B) and §110(c), respectively. At such time, the Bankrupt was

indebted to C.I.T. in an amount in excess of $1,800,000, including the unpaid balance of advances of approximately $1,000,000 made by C.I.T. during the time that the livestock in question were purchased by the Bankrupt. There was no way to determine how much, *if any*, of the funds received by the Trustee or C.I.T. during the course of the Bankruptcy proceeding came from the proceeds of the sale of the particular livestock in question.

The Opinion is to the effect that the Act and the regulations issued thereunder modify the state law otherwise applicable to a commercial transaction between a cattle seller and a meat packer and that the Act is paramount in determining the respective priorities as between a trustee in bankruptcy, a secured creditor, a bankrupt meat packer, and cattle sellers who sold cattle to the meat packer on a grade and yield basis.

REASONS FOR GRANTING WRIT

1. *Conflict between decisions of Courts of Appeals with respect to the applicability of the Act to commercial transactions otherwise governed by state law.*

As pointed out in Judge Godbold's dissent to the Opinion, the Act was enacted in 1921 as a regulatory and antitrust act to deal with monopolistic and deceptive practices of the major stockyards and meat packers. *Stafford v.*

Wallace, 258 U.S. 495 (1922); *Denver Union Stock Yard v. Producers Livestock Marketing Association*, 356 U.S. 282 (1958). Contrary to the majority decision in the Opinion, the contention that the Act by its overall regulatory sweep of the industry has supplanted or modified commercial law of the states has been repeatedly rejected prior to this case. In *Sig Ellingson & Co. v. DeVries*, 199 F. 2d 677 (8th Cir. 1952), cert. denied, 344 U.S. 934 (1953), the Eighth Circuit held that Congress made no attempt to declare who should be deemed to be the owner of cattle turned over for a bad check, the Court being convinced that the Act has not superceded the laws of the states with respect thereto. The same result was reached by the Eighth Circuit in *Sig Ellingson & Co. v. Butenbach*, 199 F.2d 679 (8th Cir. 1952), cert. denied, 344 U.S. 934 (1953). In addition to the holdings by the Eighth Circuit, the Tenth Circuit in *Adams v. Greeson*, 300 F.2d 555 (10th Cir. 1962), stated that "The Packers and Stockyards Act does not undertake to fix the respective rights of the parties to a transaction in which the owner of livestock delivers possession thereof to a purchaser who gives in payment therefor a worthless check. The Act does not have the effect of altering in part or superceding in whole the respective rights of the immediate parties under state law to a transaction of that kind."

Furthermore, the Fifth Circuit has heretofore followed the two *Ellingson* cases referred to above and left the parties to resolve their rights under existing Texas law at

the time, inasmuch as the Act did not purport to regulate or govern such rights. *John Clay & Co. Livestock Commission v. Clements, et al,* 214 F.2d 803 (5th Cir. 1954).

The Eighth and Tenth Circuits have held that the Act does not supercede or supplant what may be called the commercial laws of the states, and the Fifth Circuit has also heretofore adhered to such reasoning. By reason of the conflict with other Courts of Appeals decisions with respect to the applicability of the Act to commercial transactions as set forth above, there is clear justification for the granting of certiorari to review the Opinion below.

2. *The Opinion below raises significant and recurring problems with respect to conflicts between the Act and the Code as adopted by forty-nine (49) of the fifty (50) states and, also, significantly affects the long established powers of a trustee in bankruptcy which were created by Congress by the enactment of the Bankruptcy Act, 11 U.S.C.A. §107(c)(1)(B) and §110(c).*

The Opinion affects not only the immediate parties to this litigation, but affects every financial institution engaged in commercial financing of the packing industry, every meat packer and every cattle seller throughout the country, and would limit the power of a trustee in bankruptcy to set aside unperfected liens, claims or transfers and would raise serious questions with respect to the

trustee's right to claim title to the property of a bankrupt, which rights and powers have been clearly spelled out in the Bankruptcy Act, 11 U.S.C.A. §107(c)(1)(B) and §110(c).

The Opinion involves questions of fundamental importance with respect to the extent that a Federal regulatory act and regulations promulgated thereunder without specifically so providing can supplant, supercede or modify commercial financing transactions that have heretofore been traditionally left to the states.

In the case of *Mason City Production Credit Association v. Sig Ellingson & Co.*, 205 Minn. 537, 386 N.W. 713 (1939), cert. denied, 308 U.S. 599 (1939), rehearing denied, 308 U.S. 637 (1939), which involved the Act and its effect on the state laws of Minnesota, the Supreme Court of that state in applying the state law held that "Courts should be slow to conclude that the Act was designed to supercede local law respecting the force and effect of a chattel mortgage security upon livestock received at public stockyards." It should be noted that the Honorable Robert H. Jackson, the Solicitor General of the United States at that time, appeared in th s Court and opposed the granting of the writ. It would seem that the issue involved was of significant importance to the Federal authorities charged with the administration of the Act for the Solicitor General to appear and support the position of the Minnesota Supreme Court to the effect that state commercial laws should prevail over the Act.

By way of further emphasizing the importance of this case, it should be pointed out that in addition to the conflicting Courts of Appeals cases referred to above, the following state court decisions have held that the Act was not intended to supercede the state laws respecting commercial transactions: *Kelly v. Lang*, 62 N.W. 2d 770 (N.D. 1954); *Birmingham v. Rice Bros.*, 26 N.W. 2d 39 (Iowa Sup. Ct. 1947), cert. denied, 332 U.S. 768 (1947), rehearing denied, 332 U.S. 820 (1947); *Citizens State Bank of Dalhart v. Farmers Union Livestock Co-Op Co.*, 193 P. 2d 636 (Sup. Ct. Kan. 1948).

The impact of the holding in the Opinion has a far-reaching effect on the validity of commercial transactions throughout the country by virtue of its conflict not only with other Federal cases, but also case law of other states. The Court should further consider that uniformity of the law is an admirable achievement and forty-nine (49) of the fifty (50) states have now adopted the Code which governs commercial transactions in the states, and the Opinion has raised grave questions with respect to the Act's application to such transactions.

Furthermore, the Opinion makes serious inroads on the rights of a trustee in bankruptcy to assert claims or defenses granted to him by Congress with respect to priorities of claimants in a bankruptcy proceeding. The effect of the Opinion is to create a special and unique class of priority creditor in a bankruptcy proceeding who would not

be subject to the powers granted a trustee under sections 67(c)(1)(B) and 70(c) of the Bankruptcy Act, 11 U.S.C.A. §107(c)(1)(B) and §110(c), respectively, a situation not heretofore envisioned by Congress.

The majority's decision in the Opinion is based solely on what Petitioners consider to be erroneous implications drawn from the Act and Regulations 201.43 and 201.99 thereunder, there being no specific provision therein to support the conclusion reached by the majority that a meat packer becomes a fiduciary under the Act. The cases relied upon by the majority in the Opinion from which they draw the implication that a fiduciary relationship exists between a cattle seller and a packer dealt with regulations pertaining to stockyard owners, market agencies and dealers, but not "packers". The Act's specific provisions relating to "packers", 7 U.S.C.A. §§191-195, do not purport to attempt to govern the rights of parties engaged in a commercial transaction. The provisions of the Act relating to "packers" simply give the Secretary of the Agriculture the power to impose sanctions on a packer found to be in violation of the Act, namely cease and desist orders and fines upon convictions.

Furthermore, the net result of the Opinion in creating a fictitious trust by implication permits the "beneficiary" of that trust to recover the trust property from any third party whether or not that third party holds or ever held any of the trust property. Certainly this does violence to

every concept of tracing with respect to the laws of trusts and could impose unprecedented liability on any party dealing with a fiduciary that is created solely by implication. Such a holding transcends the scope of this litigation and would affect a wide spectrum of the law.

As the editor of the Uniform Commercial Code Law Letter, Thomas M. Quinn, Professor of Law, Fordham Law School, recently pointed out in that publication at Volume 7, Number 10, Page 5, December 1973, the application of the Act in this case "laid all the legal niceties in ruins".

Certainly the impact the Opinion will have on many future transactions involving numerous and diverse other potential litigants merits this Court's granting Certiorari to review such Opinion.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix "A"
Opinions in the Lower Courts
IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 73-1185

In The Matter Of: SAMUELS & CO., INC., Bankrupt,
CURTIS R. STOWERS, ET AL.,

Appellants,

versus

JAMES S. MAHON, Trustee, and
C.I.T. CORPORATION,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

(August 20, 1973)

Before AINSWORTH, GODBOLD and INGRAHAM,
Circuit Judges.

INGRAHAM, Circuit Judge: Since 1921 packers and stockyard men in interstate commerce have been subjected to remedial federal legislation and regulation. This appeal stems from the bankruptcy of one such regulated packer, Samuels & Co., Inc., of Dallas, Texas. The issues raised, however, all question the priority of liens between a class of cattle raisers who sold their cattle to Samuels & Co. and C.I.T. Corporation, which financed their purchase.

Prior to its filing a voluntary petition for an arrangement under Chapter XI of the Bankruptcy Act, 11 U.S.C. §701, et seq., Samuels & Co. had purchased cattle under a "grade and weight basis," and C.I.T. had financed those purchases secured by a floating lien on Samuels's inventory and other property. The cattle thus sold were delivered to the bankrupt, who slaughtered the animals. The carcasses were permitted to cool and were then inspected, graded and weighed. Samuels would then issue its check for the purchase price and further process the meat into finished products. This system is common to the meat packing industry and its conditions are spelled out by regulation published in 9 Code of Federal Regulations. C.I.T. became insecure in this plan upon learning that Samuels intended to file a plan of arrangement under Chapter XI. Thus on May 23, 1969, it refused to advance additional funds for cattle purchased. On the same day Samuels filed its plan of arrangement which ultimately led to an adjudication of straight bankruptcy in April of 1970. Appellants, repre-

senting a class of cattle sellers whose cattle were delivered to Samuels before May 23, 1969, and who had received checks in payment therefor but whose checks were returned unsatisfied, filed claims for the amount of the purchase price with the bankruptcy court. That class of cattle sellers asserted a first priority lien and their position was opposed by C.I.T., asserting the superiority of its lien on Samuels inventory.

The bankruptcy court ordered a receiver to dispose of the easily spoiled meat and meat by-products but to hold the proceeds of sale pending resolution of the conflicting claims of the cattle sellers and C.I.T. The referee ultimately held the cattle sellers' interests to be paramount and subordinated C.I.T.'s lien. C.I.T. sought review in the district court, which reversed the referree, holding:

> (a) That C.I.T. had a perfected lien in Samuels' inventory and other property;
>
> (b) That the cattle delivered by May 23, 1969, and represented by the dishonored checks, were properly includable in Samuels' inventory, i.e., that C.I.T.'s lien had attached.
>
> (c) That the class of cattle sellers had delivered goods subject to a reservation of title which, under the Uniform Commercial Code as enacted in Texas, was the mere reservation of a security interest which had not been perfected before C.I.T.'s lien attached. See Texas Business and Commercial Code §9.312(c)

The class of cattle sellers appeal. We reverse.

The facts are undisputed. The question is one of law concerning priority of liens in bankruptcy established under

the Uniform Commercial Code: Is the reserved purchase money security interest provision, Texas Business and Commercial Code (U.C.C.),* §9.107(a)[1] applicable to what would otherwise have given Samuels voidable title under §2.403 of the Code,[2] or do the regulations promulgated under the Packers and Stockyards Act, 7 U.S.C.A. §181, et seq., comprise a course of dealing and usage of trade so as to modify the Code provisions and permit the reservation of title to have effect against C.I.T.'s lien without perfection by filing under the Code, §9.301?

It is clear that between a party whose security interest has attached and been perfected and one whose security interest has merely attached, that the former lien takes priority. U.C.C. §9.301(1)(a). The latter interest is also subordinate to the rights of a person who becomes a lien creditor before the interest is perfected, and who is without knowledge of the prior security interest. §9.301(1)(b). A

*Numerical citation conforms to Texas Business and Commercial Code. Quotations are taken from 1962 official draft of U.C.C. and with some numerical changes have been adopted in Texas.

[1] "A security interest is a 'purchase money security interest' to the extent that it is

(a) taken or retained by the seller of the collateral to secure all or part of its price . . ."

[2] "(1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though

(a) the transferor was deceived as to the identity of the purchaser, or

(b) the delivery was in exchange for a check which is later dishonored, or

(c) it was agreed that the transaction was to be a 'cash sale' . . ."

trustee in bankruptcy meets these requirements. 11 U.S.C. §107(c)(1)(B); 11 U.S.C. §110(c). Our concern is, however, for the proper rule to be afforded the remedial legislation of the Packers and Stockyards Act and the valid regulations issued thereunder. 7 U.S.C.A. §181 et seq., 9 C.F.R. 201.43, 201.99.

Central to the district court's decision was the belief that the appellants' delivery of the animals while making a reservation of title acted solely as the taking of a purchase money security interest under §9.107. This would create voidable title in Samuels. §2.403, thus title to the property would be in Samuels's hands at the time of bankruptcy leaving the unperfected security interest cut off by both C.I.T.'s lien on inventory and a trustee in bankruptcy's power under §§67 and 70 of the Bankruptcy Act.[3] Where this reasoning breaks down, however, is its failure to prop-

[3] Section 1.201(37) of the Uniform Commercial Code defines a security interest as follows:

> "(37) 'Security interest' means an interest in personal property or fixtures which secures payment or performance of an obligation. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (Section 2 — 401) is limited in effect to a reservation of a 'security interest'. The term also includes any interest of a buyer of accounts, chattel paper, or contract rights which is subject to Article 9. The special property interest of a buyer of goods on identification of such goods to a contract for sale under Section 2 — 401 is not a 'security interest', but a buyer may also acquire a 'security interest' by complying with Article 9. Unless a lease or consignment is intended as security, reservation of title thereunder is not a 'security interest' but a consignment is in any event subject to the provisions on consignment sales (Section 2 — 326). Whether a lease is intended as security is to be determined by the facts of each case; however, (a) the inclusion of an option to purchase does not of itself make the lease one intended for security, and (b) an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security."

erly account for Regulations 201.43 and 201.99 promulgated under the Packers and Stockyards Act (9 CFR, §§201.43 and 201.99). Regulation 201.43 requires a packer to make its payment to his cattle suppliers promptly:

> "§*201.43* ACCOUNTS AND RECORDS, PACKERS AND STOCKYARDS ACT 1921, AS AMENDED
>
> (b) PURCHASERS TO PAY PROMPTLY FOR LIVESTOCK. Each packer, market agency, or dealer purchasing livestock shall, before the close of the next business day following the purchase of livestock and the determination of the amount of the purchase price, transmit or deliver to the seller or his duly authorized agent the full amount of the purchase price, unless otherwise expressly agreed between the parties before the purchase of livestock. Any such agreement shall be disclosed in the purchaser's records and on the accountings or other documents issued by the purchaser relating to the transaction."

Its reference to §2.401 includes a seller's reservation of title within the Code's concept of attachment and perfection of security interests. See §9.113. Section 2.401 provides in part:

> "Each provision of this Article with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title. Insofar as situations are not covered by the other provisions of this Article and matters concerning title become material the following rules apply:
>
> (1) Title to goods cannot pass under a contract for sale prior to their identification to the contract (Section 2 — 501), and unless otherwise explicitly agreed the buyer acquires by their identification a special property as limited by this Act. Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. Subject to these provisions and to the provisions of the Article on Secured Transactions (Article 9), title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties."

Thus where goods are physically delivered but title is delayed past delivery the Code treats the transaction as the seller's retention of a purchase money security interest as defined by §9.107(a), which must be perfected by filing before becoming superior to the other later perfected liens. See §9.312(c).

Regulation 201.99 requires that until the packer pays for the carcasses the carcasses be identifiably held:

> "§*201.99* PURCHASE OF LIVESTOCK BY PACKERS ON A CARCASS GRADE, CARCASS WEIGHT, OR CARCASS GRADE AND WEIGHT BASIS.
>
> (a) Each packer purchasing livestock on a carcass grade, carcass weight, or carcass grade and weight basis shall, prior to such purchase, make known to the seller, or to his duly authorized agent, the details of the purchase contract. Such details shall include, when applicable, expected date and place of slaughter, carcass price, condemnation terms, description of the carcass trim, grading to be used, accounting, and any special conditions.

Section 2.401 (reservation of title) gives the buyer voidable title until the seller is paid. Section 9.113 provides:

> "A security interest arising solely under the Article on Sales (Article 2) is subject to the provisions of this Article except that to the extent that and so long as the debtor does not have or does not lawfully obtain possession of the goods
>
> (a) no security agreement is necessary to make the security interest enforceable; and
>
> (b) no filing is required to perfect the security interest; and
>
> (c) the rights of the secured party on default by the debtor are governed by the Article on Sales (Article 2)."

Thus the seller's remedy is to reclaim the specific goods under the provisions of §2.702(b), which provides in part as follows:

> "(2) Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three months before delivery the ten day limitation does not apply. Except as provided in this subsection the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay."

We need not however decide the merits of a conflict between a trustee in bankruptcy and a seller asserting a right of reclamation, cf. *In re Kravitz*, 278 F.2d 820 (3rd Cir., 1960), and *Glessner v. Massey-Ferguson, Inc.*, 353 F.2d 986 (9th Cir., 1966), for we believe the custom and usage of the meat packing industry takes the asserted reservation of title from within the definition of a security interest.

(b) Each packer purchasing livestock on a carcass grade, carcass weight, or carcass grade and weight basis, shall maintain the identity of each seller's livestock and the carcasses therefrom and shall, after determination of the amount of the purchase price, transmit or deliver to the seller or his duly authorized agent a true written account of such purchase showing the number, weight, and price of the carcasses of each grade (identifying the grade) and of the ungraded carcasses, an explanation of any condemnations, and any other information affecting final accounting. Packers purchasing livestock on such a basis shall maintain sufficient records to substantiate the settlement of each transaction.

(c) When livestock are purchased by a packer on a carcass weight or carcass grade and weight basis, purchase and settlement therefor shall be on the basis of carcass price. This paragraph does not apply to purchases of livestock by a packer on a guaranteed yield basis.

(d) Settlement and final payment for livestock purchased by a packer on a carcass weight or carcass grade and weight basis shall be on actual (hot) carcass weights determined before shrouding. The hooks, rollers, and gambrels or other similar equipment used at a packing establishment in connection with the weighing of carcasses of the same species of livestock shall be uniform in weight. The tare weight shall include only the weight of such equipment.

(e) Settlement and final payment for livestock purchased by a packer on a USDA carcass grade shall be on an official (final, not preliminary) grade. If settlement and final payment are based upon any grades other than official USDA grades, such other grades shall be set forth in detailed written specifications which shall be made available to the seller or his duly authorized agent. For purposes of settlement and final

payment for livestock purchased on a grade or grade and weight basis, carcasses shall be final graded before the close of the second business day following the day the livestock are slaughtered."

These regulations had binding effect on Samuels, whose compliance therewith permitted it to continue its operations.

C.I.T. responds to appellants' arguments under the Code, §1.205,[4] by observing that the regulations are not inconsistently applied and are but a means to implement a seller's right of reclamation provided by U.C.C. §2.702(b).

Like the district court's conclusion on the application of §9.107(b), C.I.T.'s argument misses the unique pattern of

[4] "(1) A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

(2) A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.

(3) A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.

(4) The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.

(5) An applicable usage of trade in the place where any part of performance is to occur shall be used in interpreting the agreement as to that part of the performance.

(6) Evidence of a relevant usage of trade offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise to the latter."

the Packers and Stockyards Act and Regulations. Meat and meat by-products of like grade and weight are, as the referee found, fungible goods:

> "When the livestock has been graded and the yield determined the meat is processed, packaged and sold. After the livestock has been processed and packaged, it is impossible to trace or identify any seller's particular livestock."

The Packers and Stockyards Act regulations are a recognition that once a check has issued from a packer, the carcass will be processed and its identity lost. Consequently, the "hot check" provision of U.C.C. §§2.403(a)(2) is an unavailable remedy. The Packers and Stockyards regulations and cases, therefore, consider the packer's obligation to pay to be that of a fiduciary, *Bowman v. U.S.D.A.*, 363 F.2d 81 (5th Cir., 1966), and the purpose of the act to be the protection of the producer's and consumer's purse. *Bowman, supra; Glover Livestock Co. v. Hardin*, 454 F.2d 109 (8th Cir., 1972); *Bruhn's Freezer Meats of Chicago, Inc. v. U.S.D.A.*, 438 F.2d 1332 (8th Cir., 1971); *Swift & Co. v. United States*, 393 F.2d 247 (7th Cir., 1968). The reasoning of these cases and the impact of the Packers and Stockyards Act convinces this court that more than an unperfected security interest subject to reclamation is reserved for the cattle seller. Not by contract but by statute and regulation a packer lacks full dominion over the carcasses until the seller has been paid. Where the packer defaults by the issuance of a bad check (and destroys the identity of the security by processing the carcasses into fungible meat

products), the seller is the beneficiary of a trust imposed by remedial statute. This we must note was the very statute which permitted the bankrupt to engage as a meat packer in interstate commerce and it is clear that the Packers and Stockyards Act and Regulations 201.42 and 201.99 thereunder comprise a course of dealing and usage of trade known to both the bankrupt packer and C.I.T., which had financed it for an extended period.

The judgment of the district court is REVERSED and REMANDED with directions to reinstate the judgment of the referee.

GODBOLD, Circuit Judge, dissenting:

I am unable to join with the majority in their decision that the Packers & Stockyards Act, 7 U.S.C. §181 et seq., and the regulations issued thereunder, prevail over the Uniform Commercial Code by imposing a trust upon proceeds of sale of meat products processed from cattle carcasses delivered by the sellers, thus entitling the sellers to recover as beneficiaries of the trust. Neither the general scope of the Act nor the specific regulations relied upon support the majority's conclusion. Prior cases in this circuit and elsewhere have rejected contentions that with respect to matters not specifically covered by it, the Act supplanted what might be termed commercial law of the states.

The District Court concluded as a matter of law that CIT had a perfected lien on the inventory and accounts

receivable of Samuels & Co., Inc. ("Samuels") which prevailed over the rights of the sellers under the U.C.C., as adopted by the State of Texas, Tex. Bus. & Comm. Code Ann. §1.101, et seq. (Tex. U.C.C. 1968) and rejected the conclusion of the referee that the interests of the sellers were paramount.[1] The majority reverse the District Court's conclusion of law and reinstate that of the referee.

The majority conclude that in certain circumstances the Act, considered together with the regulations and the usages of the trade, imposes a trust upon proceeds in the hands of a meat packer, received by the packer from the sale of meat products. The "certain circumstances" are these: the cattle must have been received by the packer in the type of transaction well known to the trade and described by 9 CFR 201.99, pursuant to which regulation the packer is required to maintain the identity of carcasses when the animals are killed and also maintain sufficient records concerning the carcasses; and the packer has destroyed the identity of the carcasses by processing them into fungible meat products.[2] Under these circumstances the majority impress a trust relationship with the consequence that Samuels has less than full title, and the seller, as beneficiary of the trust, has an equitable interest confer-

[1]Neither the District Court nor this court is bound by the clearly erroneous rule in reviewing conclusions of law made by a district court in its review of a referee's order. International Minerals & Chemicals Corp. v. Moore, 361 F.2d 849 (CA5, 1966). I perceive no factual problems in this appeal. The District Judge adopted the referee's findings of fact as not clearly erroneous and the majority, under the same standard of reviewing the underlying facts pursuant to the plainly erroneous rule, Bazemore v. Stehling, 396 F.2d 701 (CA5, 1968), consider the facts as not in material dispute. I do not disagree with that conclusion.

ring on him a status superior to that of CIT which, as secured creditor, held a lien on the inventory and accounts receivable of Samuels. Obviously this does considerable violence to the state commercial law concerning passage of title to chattels, manner of perfecting liens, and the protective scope of liens. The predicate for this imposition of a trust consists of implications drawn from the overall scheme of the Act and from Regulation 201.99, neither of which expressly makes Samuels a fiduciary.

The Act was promulgated in 1921 as a regulatory and antitrust act to deal with monopolistic and deceptive practices of the major stockyards and meat packers. *Stafford v. Wallace,* 258 U.S. 495, 66 L.Ed. 735 (1922); *Denver Union Stock Yard v. Producers Livestock Marketing Ass'n,* 356 U.S. 282, 2 L.Ed. 2d 771 (1958). In 1958 and 1968 it was amended to meet changed conditions in the industry by authorizing broader authority for regulation by the Secretary of Agriculture and by more precisely delineating the division of authority between the Federal Trade Commission and the Secretary of Agriculture. 1958 U.S. Code Cong. & Admin. News 5213; 1968 U.S. Code Cong. & Admin. News 2864.

I am unable to find, nor do the majority refer to any legislative history evidencing Congressional intent that —

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[1]The majority opinion refers at one point to the fact that in purported payment for the cattle the packer has issued checks not honored by the bank, as being a factor in triggering the imposition of a trust. This would seem to be a breach of trust rather than an incident giving rise to its existence.

except to the extent specifically done — the Act should supplant or modify the general body of state laws governing commercial transactions. Congress has not undertaken to regulate every aspect of the packing and stockyards industry, so state law continues to fill out the federal regulatory scheme. *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 10 L.Ed. 2d 248 (1963); *Chemical Specialties Manufacturers Ass'n, Inc. v. Clark,* _____ F. 2d _____ [No. 72-1791, CA5, July 12, 1973].

In numerous cases the contention has been repeatedly made that the Act, by its overall regulatory sweep of the industry or by implications drawn from its specific provisions, has supplanted or modified commercial law of the states.[3] In *Sig Ellingson & Co. v. De Vries,* 199 F.2d 677 (CA8), *cert. denied,* 344 U.S. 934, 97 L.Ed. 719 (1953), plaintiff sold his cattle to Brackey and received a worthless check. Brackey then sold the cattle through defendant Ellingson, a livestock commission merchant licensed as a market agency under the Act. Plaintiff sued Ellingson for conversion. The District Court found that under applicable state law (of Iowa and Minnesota) title does not pass to one paying with a worthless check, so that ownership and right to retake possession remained in plaintiff who was thus entitled to recover from Ellingson. Ellingson recognized that the Act did not purport to declare specifically

[3]Some cases are pre-U.C.C., others post-U.C.C., which is of no moment, since the issue is whether the Act supplants or modifies state laws of commercial transactions, statutory or non-statutory.

the respective rights of owners and market agencies in such a situation. It contended, however, that the overall regulatory scheme of the Act, which treats stockyards and market agencies as public utilities and imposes regulations upon them, and the specific provisions of the Act requiring nondiscriminatory practices and prohibiting unjust, unreasonable and discriminatory practices and depriving the commission merchant of the freedom to choose his own customers, overrode the state law which made the market agency liable for conversion of the cattle. The Eighth Circuit rejected this as had the District Court, saying:

> [4] But it appeared to the trial court that the liability of the defendant market agency to plaintiffs which resulted from its sale of the cattle under the law of Iowa and of Minnesota was not affected either by the terms or by necessary implications of the federal Act. The services performed by the market agencies were in the nature of public utility services vitally necessary to the movement of livestock in interstate commerce before the passage of the Packers and Stockyards Act. It was on that ground that Congress had and exercised the power to regulate them for the prevention of unjust discriminations and abuses. But Congress made no attempt to declare who should be deemed the owner of cattle turned over for a bad check nor to relieve the market agencies from liability imposed by State law for selling cattle for principals who were not the owners. The Act was aimed at unjust discriminations incompatible with public utility operations, but it in no wise impairs the freedom of the market agencies to adopt proper measures to prevent and suppress frauds. The court was convinced that the Act has not superseded the law of Iowa or of Minnesota under which the defendant in this case became liable to the plaintiffs.

> The opinion of the trial court and cases cited reflect that earnest arguments have been presented on behalf of the livestock market agencies to the effect that the law governing their liability or immunity in such a case as is here presented ought to be uniform at all the markets regulated under the federal Act and that the agencies ought not to be held liable for conversion in respect to cattle sales made under such circumstances as are found in this case. There are also cogent considerations of the same abstract character tending strongly to contrary conclusions. But we see no occasion to add further to that discussion. We find no error in the conclusion of the trial court that the Packers and Stockyards Act does not, either by express provision or by necessary implication, establish the rights of the parties to this action resulting from the sale of the 33 head of cattle. State law is controlling and we find no error in the declaration and application of that law by the trial court.

199 F.2d at 679. A companion case reached the same result. *Sig Ellingson & Co. v Butenbach,* 199 F.2d 679 (CA8), *cert. denied,* 344 U.S. 934, 97 L.Ed. 719 (1953).[4]

Subsequently on facts parallel to those of *Ellingson* the Tenth Circuit gave effect to the law of Arkansas, producing an ultimate result on liability precisely the opposite of the result in *Ellingson.* Under Arkansas law one giving a

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[4]Some of the history behind Sig Ellingson & Co. v. DeVries is of interest. The court relied in part on Birmingham v. Rice Bros., 26NW2d 39, 2 ALR 2d 1108 (Iowa), 332 U.S. 768, 92 L.Ed. 353 (1947). That case had, in turn, referred to Mason City Prod. Credit Ass'n v. Sig Ellingson & Co., 286 NW 713 (Minn.), *cert. denied,* 308 U.S. 599, 84 L.Ed. 501 (1939), which had held the act did not free market agencies of liability under state law for selling mortgaged cattle. According to the court in *Birmingham,* the Solicitor General of the United States appeared in the Supreme Court in *Mason City* to oppose the petition for a writ of certiorari, which was refused.

worthless check acquires defeasible title, so that a commission agent who sold cattle for such a person was not liable to the original owner who had parted with the cattle for the worthless check. *Adams v. Greeson*, 300 F. 2d 555 (CA10, 1962).

In 1954 this circuit followed the two *Ellingson* cases and held that the Act did not absolve market agencies from liability under Texas law for sale of cattle obtained by worthless check. *John Clay & Co. Livestock Commission v. Clements*, 214 F. 2d 803 (CA5, 1954).[5]

Numerous state cases, including a Texas case, have rejected arguments that the Act has supplanted state law in various commercial transaction contexts. *Walker v. Caviness*, 256 S.W. 2d 880 (Tex. Civ. App. 1953), *Mason City Prod. Credit Ass'n v. Sig Ellingson & Co.*, 286 N.W. 713 (Minn.), *cert. denied*, 308 U.S. 599, 84 L.Ed. 501 (1939), and *Moderie v. Schmidt*, 108 P.2d 331 (Wash 1940) [market agent liable for sale of mortgaged or stolen cattle]; *Birmingham v. Rice Bros.*, 26 N.W. 2d 39, 2 ALR 2d 1108 (Iowa), *cert. denied*, 332 U.S. 768, 92 L.Ed. 353 (1947)

[5]Sebastopol Meat Co. v. Secretary of Agriculture, 440 F.2d 983 (CA9, 1971) is not contrary to the above case law. The Secretary issued a cease and desist order against a corporation which was a packer, and an individual who was its alter ego but not a packer, for failure to pay for livestock, in violation of 9 C.F.R. §201.43(b), thereby violating 7 U.S.C. §192(b) which authorizes cease and desist orders against packers. The only issue on appeal was whether state law limitations on the alter ego doctrine prevented the cease and desist order from running against the individual. The court held that a remedial order, which the Secretary was empowered by a federal regulatory statute to issue, and which unquestionably reached the corporation, could not be thwarted by state limitations on the alter ego doctrine which was usually invoked in private litigation.

[same facts as in *Ellingson v. DeVries, supra*]. See also, *First Nat. Bank v. Siman*, 289 N.W. 416 (S.D. 1939), and *Citizens State Bank v. Farmers Union Livestock Co-op Co.*, 193 P.2d 636 (Kans. 1948).

The only federal case contrary to the above body of case law appears to be *Sullivan & Co. v. Wells*, 89 F. Supp. 317 (D. Neb. 1950), decided prior to the *Ellingson* cases, *Adams v. Greeson*, and the decision of this circuit in *John Clay & Co.*, and relying upon what was recognized to be a minority view originating from state courts in Missouri and Kentucky.

While tangential to the case before us, which does not directly relate to powers of the Secretary of Agriculture, a body of case law points out that certain efforts of the Secretary to act with regard to matters governed by the commercial law of the states are beyond the jurisdiction conferred upon him by the Act. In *Guenther v. Morehead*, 272 F.Supp. 721 (S.D. Iowa, 1967), Banks falsely represented to plaintiff that he had purchased 64 head of cattle for plaintiff at Milan Livestock Auction, and plaintiff gave Banks a check payable to Milan bearing the notation "for 64 head of cattle." Instead of applying the check to any account of plaintiff, Banks gave it to Milan in part payment for hogs he had previously bought. Plaintiff complained to the Secretary of Agriculture who, under 7 U.S.C. §210(e), ordered Milan to repay plaintiff. Milan refused to pay and plaintiff sued to enforce. The court considered 7

U.S.C. §§206, 208, 212 and 213, and concluded that Milan's wrongful negotiation of plaintiff's check for a purpose other than that noted on its face was a matter outside the Secretary's jurisdiction. 272 F. Supp. at 721. In *McClure v. E.A. Blacksher Co.*, 231 F. Supp. 678 (D. Md. 1964), the Secretary of Agriculture had entered an order awarding damages, pursuant to 7 U.S.C. §210(e), directing a dealer to pay sellers for cattle sold. The defendant refused to comply and the sellers sued on the order under §210(f). The District Court found that the Secretary had no jurisdiction to enter the order. It considered 7 U.S.C.A. §§201-03, 205-07, 211-17 and rejected their applicability. The Secretary had based his order on the theory that an unjustified failure to pay for livestock purchased was a violation of §208, requiring market agencies to establish and observe just and reasonable practices in respect to the furnishing of stockyard services and forbidding contrary practices. The court found that this was the only section of even arguable application, and, after considering a mass of legislative history and finding it uninformative, footnote 3 at 231 F. Supp. 682, found that the section did not relate to ordinary debtor-creditor relationships.[6]

The language of Regulation 201.99 does not specifically make the packer a trustee of either cattle purchased or of the proceeds. It imposes upon the packer duties to make

[6]Branscombe v. Schonweiss, 361 F.2d 717 (CA7, 1966), sustained an order of the Secretary awarding damages for a bad check given by a market agency. Issues of jurisdiction and authority were not referred to and presumably were not raised.

known to the seller the details of the purchase contract, to identifiably maintain the livestock and the carcasses therefrom, to transmit a written account of the purchase, and to maintain sufficient records.[7]

Samuels was a packer, one who buys livestock for slaughter, manufactures and prepares the meat and stock for sale or shipment in commerce, and markets the meat in commerce. 7 U.S.C. §191. The deleterious acts of packers at which the Act was directed consisted of monopolistic and discriminatory market practices. See *Armour & Co. v. U.S.*, 402 F. 2d 712 (CA7, 1968); *Swift & Co. v. U.S.*, 393 F.2d 247 (CA7, 1968); *Swift & Co. v. U.S.*, 317 F.2d 53 (CA7, 1963). The packer's role in the industry is different from that of market agencies and dealers, and the Act and the regulations recognize this and treat him differently. The financial abuses at which the Act was directed were those of market agencies and dealers and stockyards. A market agency buys and sells cattle on a commission basis or furnishes stockyard services, 7 U.S.C. §201(c), and a dealer buys and sells cattle, 7 U.S.C. §201(d). Market agencies and dealers must register, 9 CFR 201.10, and must be bonded to secure their financial obligations. 7 U.S.C.

[7] On the record before us it is not shown that Samuels breached any of these duties. All say that it is impossible to trace the carcasses of the livestock sold by plaintiffs into identifiable monetary proceeds, but the reason for this is not shown to be any default by Samuels of its obligations, which do not extend to keeping records that will record the path of specific cattle into identifiable cuts of meat or hamburger or identifiable sales. Samuels' breach of obligations was by giving a check which the bank would not honor, a matter not governed by this regulation, and, as previously discussed, rejected by several courts as the basis for jurisdiction under the Act.

§204, 9 CFR 201.27-34. As early as 1923 the Secretary promulgated a regulation which prohibited market agencies from using funds of owners or consignors of livestock or mingling such funds with its own, a regulation which made the market agency a fiduciary in relation to the proceeds of sales of livestock handled by it for customers. *U.S. v. Donahue Bros.*, 59 F.2d 1019 (CA8, 1932). The present regulations continue the fiduciary relationship, forbid the market agency from using customers' fund for its own purposes either directly or through the "float" in the agency's bank account, and specifically require maintenance of a separate custodial bank account for these funds held as fiduciary. 9 CFR 201.40, 201.42; *Bowman v. U.S. Dept. of Agriculture*, 363, F.2d 81 (CA5, 1966). The financial practices of packers are not regulated in the same manner, they are not bonded to secure their financial obligations, and they need not segregate funds. The cases which the majority cite as imposing a fiduciary duty on Samuels involved regulatory violations and financial abuses by stockyard owners, market agencies, and dealers, not by packers. *Bowman v. U.S., supra; Glover Livestock Commission v. Hardin*, 454 F.2d 109 (CA8, 1972); *U.S. v. Donahue Bros., Inc., supra.*[8] The Act gives a private cause of action against stockyards, market agencies and dealers, 7

[8]Bruhn's Freezer Meats, 438 F.2d 1332 (CA8, 1971), refers to the Act's permitting the Secretary to exercise as broad a control of packers as the Constitution permits. The statement must be considered in the context of the case, which concerned whether a chain of meat freezer plants was a packer and whether its misrepresentations and similar sales tactics were deceptive practices under 7 U.S.C. §192(a), both of these matters being inquiries plainly within the scope of the Act.

U.S.C. §209, but none against packers, who are subject to administrative charges at the hands of the Secretary. 7 U.S.C. §§191-95.

At the end of their opinion the majority refer to 9 CFR 201.43 which requires a packer to promptly pay sellers, as a custom and usage of the trade binding on Samuels and CIT. The U.C.C. itself provides for consideration of industry usages and practices, which may constitute part of the agreement made by parties, §§1.201 and 1.205, but the effect of incorporation of usage and practice into the agreement is also governed by the U.C.C., §1.102(c). Delivery of goods with a duty on the recipient to promptly pay does not, under U.C.C., alter the consequence that title passes upon delivery with the seller having only a seller's security interest, §2.401, which in the circumstances of this case (no financing statement having been filed and no notice given to CIT, §9.312(c)) is junior to the lien of a secured creditor, or having a right to reclaim under §2.507 and §2.702 (in this instance, not timely asserted). Thus custom and usage are employed by the majority to override the specific provisions of state law which provide both for giving effect to custom and usage and the consequence of doing so, and to produce an ultimate result the reverse of that commanded by state law.

Of course, there are areas of state commercial laws which are modified or supplanted by federal regulatory measures. The Miller Act, 40 U.S.C. §270a, and bonds furnished

under it, present matters for application of federal law, *Indemnity Insurance Co. v. Browning-Ferris Mach. Co.*, 227 F.2d 804 (CA5, 1955), as do surety bonds required of market agencies and dealers under the Packers & Stockyards Act, *USF&G v. Quinn Bros.*, 384 F.2d 241 (CA5, 1967). But these spring from specific statutory provisions — in the case of the market agency or dealer, 7 U.S.C. §204 authorizes the Secretary to require the bond under rules and regulations which he may, and has, prescribed, 9 CFR §201.27, et seq. — or by implication in circumstances different from those here present. The history and the language of the Act, the language of Regulation 201.99, the pattern of regulations making fiduciaries of others in the industry, and the case law all are inconsistent with overriding state law by implication in this instance.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 73-1185

In The Matter Of: SAMUELS & CO., INC., Bankrupt,
CURTIS R. STOWERS, ET AL.,

Appellants,

versus

JAMES S. MAHON, Trustee, and
C.I.T. CORPORATION,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion Aug. 20, 1973, 5 Cir., 1973, ____ F.2d ____).

(October 31, 1973)

Before AINSWORTH, GODBOLD and INGRAHAM, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX "B"

STATUTORY PROVISIONS

7.U.S.C.A. PACKERS GENERALLY

§191. "Packer" defined

When used in this chapter —

The term "packer" means any person engaged in the business (a) of buying livestock in commerce for purposes of slaughter, or (b) of manufacturing or preparing meats or meat food products for sale or shipment in commerce, or (c) of manufacturing or preparing livestock products for sale or shipment in commerce, or (d) of marketing meats, meat food products, livestock products, dairy products, poultry, poultry products, or eggs, in commerce; but no person engaged in such business of manufacturing or preparing livestock products or in such marketing business shall be considered a packer unless —

(1) Such person is also engaged in any business referred to in clause (a) or (b) of this section, or unless

(2) Such person owns or controls, directly or indirectly, through stock ownership or control or otherwise, by himself or through his agents, servants, or employees, any interest in any business referred to in clause (a) or (b) of this section, or unless

(3) Any interest in such business of manufacturing or preparing livestock products, or in such marketing business is owned or controlled, directly or indirectly, through stock

ownership or control or otherwise, by himself or through his agents, servants, or employees, by any person engaged in any business referred to in clause (a) or (b) of this section, or unless

(4) Any person or persons jointly or severally, directly or indirectly, through stock ownership or control or otherwise, by themselves or through their agents, servants, or employees, own or control in the aggregate 20 per centum or more of the voting power or control in such business of manufacturing or preparing livestock products, or in such marketing business and also 20 per centum or more of such power or control in any business referred to in clause (a) or (b) of this subsection.

§192. Unlawful practices enumerated

It shall be unlawful with respect to livestock, meats, meat food products, livestock products in unmanufactured form, poultry, or poultry products for any packer or any live poultry dealer or handler to:

(a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in commerce; or

(b) Make or give, in commerce, any undue or unreasonable preference or advantage to any particular person or locality in any respect whatsoever, or subject, in commerce, any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; or

(c) Sell or otherwise transfer to or for any other packer, or any live poultry dealer or handler, or buy or otherwise receive from or for any other packer or any live poultry dealer or handler any article for the

purpose or with the effect of apportioning the supply in commerce between any such packers, if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly in commerce; or

(d) Sell or otherwise transfer to or for any other person, or buy or otherwise receive from or for any other person, any article for the purpose or with the effect of manipulating or controlling prices in commerce, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article in commerce, or of restraining commerce; or

(e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices in commerce, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article in commerce, or of restraining commerce; or

(f) Conspire, combine, agree, or arrange with any other person (1) to apportion territory for carrying on business in commerce, or (2) to apportion purchases or sales of any article in commerce, or (3) to manipulate or control prices in commerce; or

(g) Conspire, combine, agree, or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by subsidivisions (a)-(d) or (e) of this section.

§193. Procedure before Secretary for violations; complaint; hearing; intervention; report and order; service of process

(a) Whenever the Secretary has reason to believe that any packer has violated or is violating any provision of sections 191-195 of this title, he shall cause a complaint in writing to be served upon the packer, stating his charges in that respect, and requiring the packer to attend and testify

at a hearing at a time and place designated therein, at least thirty days after the service of such complaint; and at such time and place there shall be afforded the packer a reasonable opportunity to be informed as to the evidence introduced against him (including the right of cross-examination), and to be heard in person or by counsel and through witnesses, under such regulations as the Secretary may prescribe. Any person for good cause shown may on application be allowed by the Secretary to intervene in such proceeding, and appear in person or by counsel. At any time prior to the close of the hearing the Secretary may amend the complaint; but in case of any amendment adding new charges the hearing shall, on the request of the packer, be adjourned for a period not exceeding fifteen days.

(b) If, after such hearing, the Secretary finds that the packer has violated or is violating any provisions of sections 191-195 of this title covered by the charges, he shall make a report in writing in which he shall state his findings as to the facts, and shall issue and cause to be served on the packer an order requiring such packer to cease and desist from continuing such violation. The testimony taken at the hearing shall be reduced to writing and filed in the records of the Department of Agriculture.

(c) Until the record in such hearing has been filed in a court of appeals of the United States, as provided in section 194 of this title, the Secretary at any time, upon

such notice and in such manner as he deems proper, but only after reasonable opportunity to the packer to be heard, may amend or set aside the report or order, in whole or in part.

(d) Complaints, orders, and other processes of the Secretary under this section may be served in the same manner as provided in section 45 of Title 15.

§194. Conclusiveness of order; appeal and review; temporary and final injunction

(a) An order made under section 193 of this title shall be final and conclusive unless within thirty days after service the packer appeals to the court of appeals for the circuit in which he has his principal place of business, by filing with the clerk of such court a written petition praying that the Secretary's order be set aside or modified in the manner stated in the petition, together with a bond in such sum as the court may determine, conditioned that such packer will pay the costs of the proceedings if the court so directs.

(b) The clerk of the court shall immediately cause a copy of the petition to be delivered to the Secretary, and the Secretary shall thereupon file in the court the record in such proceedings, as provided in section 2112 of Title 28. If before such record is filed the Secretary amends or sets aside his report or order, in whole or in part, the petitioner may amend the petition within such time as the court may determine, on notice to the Secretary.

(c) At any time after such petition is filed, the court, on application of the Secretary, may issue a temporary injunc-

tion, restraining, to the extent it deems proper, the packer and his officers, directors, agents, and employees, from violating any of the provisions of the order pending the final determination of the appeal.

(d) The evidence so taken or admitted, and filed as aforesaid as a part of the record, shall be considered by the court as the evidence in the case. The proceedings in such cases in the court of appeals shall be made a preferred cause and shall be expedited in every way.

(e) The court may affirm, modify, or set aside the order of the Secretary.

(f) If the court determines that the just and proper disposition of the case requires the taking of additional evidence, the court shall order the hearing to be reopened for the taking of such evidence, in such manner and upon such terms and conditions as the court may deem proper. The Secretary may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken, and he shall file such modified or new findings and his recommendations, if any, for the modification or setting aside of his order, with the return of such additional evidence.

(g) If the court of appeals affirms or modifies the order of the Secretary, its decree shall operate as an injunction to restrain the packer, and his officers, directors, agents, and employees from violating the provisions of such order or such order as modified.

(h) The court of appeals shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to review, and to affirm, set aside, or modify, such orders of the Secretary, and the decree of such court shall be final except that it shall be subject to review by the Supreme Court of the United States upon certiorari, as provided in section 1254 of Title 28, if such writ is duly applied for within sixty days after entry of the decree. The issue of such writ shall not operate as a stay of the decree of the court of appeals, insofar as such decree operates as an injunction unless so ordered by the Supreme Court.

(i) Omitted.

§195. Punishment for violation of order

Any packer, or any officer, director, agent, or employee of a packer, who fails to obey any order of the Secretary issued under the provisions of section 193 of this title, or such order as modified —

(1) After the expiration of the time allowed for filing a petition in the court of appeals to set aside or modify such order, if no such petition has been filed within such time; or

(2) After the expiration of the time allowed for applying for a writ of certiorari, if such order, or such order as modified, has been sustained by the court of appeals and no such writ has been applied for within such time; or

(3) After such order, or such order as modified, has been sustained by the courts as provided in section 194 of this title; shall on conviction be fined not less than $500 nor more than $10,000, or imprisoned for not less than six

months nor more than five years, or both. Each day during which such failure continues shall be deemed a separate offense.

9.C.F.R. ACCOUNTS AND RECORDS

§201.43 Payment and accounting for livestock and live poultry.

(b) *Purchasers to pay promptly for livestock.* Each packer, market agency, or dealer purchasing livestock shall, before the close of the next business day following the purchase of livestock and the determination of the amount of the purchase price, transmit or deliver to the seller or his duly authorized agent the full amount of the purchase price, unless otherwise expressly agreed between the parties before the purchase of the livestock. Any such agreement shall be disclosed in the records of any market agency or dealer selling the livestock, and in the purchaser's records and on the accounts or other documents issued by the purchaser relating to the transaction. The provisions of this section shall not be construed to permit any transaction prohibited by §201.61(a) relating to financing by market agencies selling on a commission basis.

§201.99 Purchase of livestock by packers on a carcass grade, carcass weight, or carcass grade and weight basis.

(a) Each packer purchasing livestock on a carcass grade, carcass weight, or carcass grade and weight basis shall, prior to such purchase, make known to the seller, or to his duly authorized agent, the details of the purchase contract. Such details shall include, when applicable, expected date

and place of slaughter, carcass price, condemnation terms, description of the carcass trim, grading to be used, accounting, and any special conditions.

(b) Each packer purchasing livestock on a carcass grade, carcass weight, or carcass grade and weight basis, shall maintain the identity of each seller's livestock and the carcasses therefrom and shall, after determination of the amount of the purchase price, transmit or deliver to the seller, or his duly authorized agent, a true written account of such purchase showing the number, weight, and price of the carcasses of each grade (identifying the grade) and of the ungraded carcasses, an explanation of any condemnations, and any other information affecting final accounting. Packers purchasing livestock on such a basis shall maintain sufficient records to substantiate the settlement of each transaction.

(c) When livestock are purchased by a packer on a carcass weight or carcass grade and weight basis, purchase and settlement therefor shall be on the basis of carcass price. This paragraph does not apply to purchases of livestock by a packer on a guaranteed yield basis.

(d) Settlement and final payment for livestock purchased by a packer on a carcass weight or carcass grade and weight, basis shall be on actual (hot) carcass weights. The hooks, rollers, and gambrels or other similar equipment used at a packing establishment in connection with the weighing of carcasses of the same species of livestock shall be uniform in weight. The tare weight shall include

only the weight of such equipment: *Provided, however,* That until July 1, 1968, these packers who shroud carcasses before weighing them may include in the tare weight the average weight of the shrouds and pins.

(e) Settlement and final payment for livestock purchased by a packer on a USDA carcass grade shall be on an official (final — not preliminary) grade. If settlement and final payment are based upon any grades other than official USDA grades, such other grades shall be set forth in detailed written specifications which shall be made available to the seller or his duly authorized agent. For purposes of settlement and final payment for livestock purchased on a grade or grade and weight basis, carcasses shall be final graded before the close of the second business day following the day the livestock are slaughtered.

11. U.S.C.A.

§107. Liens and fraudulent transfers

(c) (1) The following liens shall be invalid against the trustee:

(B) Every statutory lien which is not perfected or enforceable at the date of bankruptcy against one acquiring the rights of a bona fide purchaser from the debtor on that date, whether or not such purchaser exists: *Provided,* That where a statutory lien is not invalid at the date of bankruptcy against the trustee under subdivision (c) of section 110 of this title and is required by applicable lien law to be perfected in order to be valid against a subsequent bona fide purchaser, such a lien may nevertheless be valid under this subdivision if perfected within the time permitted by and in accordance with the requirements of such law:

And provided further, That if applicable lien law requires a lien valid against the trustee under section 110(c) of this title to be perfected by the seizure of property, it shall instead be perfected as permitted by this subdivision by filing notice thereof with the court:

§110. Title to property

(c) The trustee may have the benefit of all defenses available to the bankrupt as against third persons, including statutes of limitation, statutes of frauds, usury, and other personal defenses; and a waiver of any such defense by the bankrupt after bankruptcy shall not bind the trustee. The trustee shall have as of the date of bankruptcy the rights and powers of: (1) a creditor who obtained a judgment against the bankrupt upon the date of bankruptcy, whether or not such a creditor exists, (2) a creditor who upon the date of bankruptcy obtained an execution returned unsatisfied against the bankrupt, whether or not such a creditor exists, and (3) a creditor who upon the date of bankruptcy obtained a lien by legal or equitable proceedings upon all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt upon a simple contract could have obtained such a lien, whether or not such a creditor exists. If a transfer is valid in part against creditors whose rights and powers are conferred upon the trustee under this subdivision, it shall be valid to a like extent against the trustee. In cases where repugnancy or inconsistency exists with reference to the rights and powers in this subdivision conferred, the trustee may elect which rights and powers to

exercise with reference to a particular party, a particular remedy, or a particular transaction, without prejudice to his right to maintain a different position with reference to a different party, a different remedy, or a different transaction.

TEXAS BUSINESS AND COMMERCE CODE

§1.201.

(32) "Purchase" includes taking by sale, discount, negotiation, mortgage, pledge, lien, issue or reissue, gift or any other voluntary transaction creating an interest in property.

(33) "Purchaser" means a person who takes by purchase.

(37) "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (Section 2.401) is limited in effect to a reservation of a "security interest." The term also includes any interest of a buyer of accounts or chattel paper which is subject to Chapter 9. The special property interest of a buyer of goods on identification of such goods to a contract for sale under Section 2.401 is not a "security interest", but a buyer may also acquire a "security interest" by complying with Chapter 9. Unless a lease or consignment is intended as security, reservation of title thereunder is not a "security interest" but a consignment is in any event subject to the

provisions on consignment sales (Section 2.326). Whether a lease is intended as security is to be determined by the facts of each case; however, (A) the inclusion of an option to purchase does not of itself make the lease one intended for security, and (B) an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security.

(44) "Value". Except as otherwise provided with respect to negotiable instruments and bank collections (Sections 3.303, 4.208 and 4.209) a person gives "value" for rights if he acquires them

(A) in return for a binding commitment to extend credit or for the extension of immediately available credit whether or not drawn upon and whether or not a charge-back is provided for in the event of difficulties in collection; or

(B) as security for or in total or partial satisfaction of a pre-existing claim; or

(C) by accepting delivery pursuant to a pre-existing contract for purchase; or

(D) generally, in return for any consideration sufficient to support a simple contract.

§2.326. Sale on Approval and Sale or Return; Consignment Sales and Rights of Creditors

(a) Unless otherwise agreed, if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is

(1) a "sale on approval" if the goods are delivered primarily for use, and

(2) a "sale or return" if the goods are delivered primarily for resale.

(b) Except as provided in Subsection (c), goods held on approval are not subject to the claims of the buyer's creditors until acceptance; goods held on sale or return are subject to such claims while in the buyer's possession.

(c) Where goods are delivered to a person for sale and such person maintains a place of business at which he deals in goods of the kind involved, under a name other than the name of the person making delivery, then with respect to claims of creditors of the person conducting the business the goods are deemed to be on sale or return. The provisions of this subsection are applicable even though an agreement purports to reserve title to the person making delivery until payment or resale or uses such words as "on consignment" or "on memorandum". However, this subsection is not applicable if the person making delivery

(1) complies with an applicable law providing for a consignor's interest or the like to be evidenced by a sign, or

(2) establishes that the person conducting the business is generally known by his creditors to be substantially engaged in selling the goods of others, or

(3) complies with the filing provisions of the chapter on Secured Transactions (Chapter 9).

(d) Any "or return" term of a contract for sale is to be treated as a separate contract for sale within the statute of frands section of this chapter (Section 2.201) and as contra-

dicting the sale aspect of the contract within the provisions of this chapter on parol or extrinsic evidence (Section 2.202).

§2.401. Passing of Title; Reservation for Security; Limited Application of This Section

Each provision of this chapter with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title. Insofar as situations are not covered by the other provisions of this chapter and matters concerning title become material the following rules apply:

(a) Title to goods cannot pass under a contract for sale prior to their identification to the contract (Section 2.501), and unless otherwise explicitly agreed the buyer acquires by their identification a special property as limited by this title. Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. Subject to these provisions and to the provisions of the chapter on Secured Transactions (Chapter 9), title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.

(b) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and

even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading

(1) if the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; but

(2) if the contract requires delivery at destination, title passes on tender there.

(c) Unless otherwise explicitly agreed where delivery is to be made without moving the goods,

(1) if the seller is to deliver a document of title, title passes at the time when and the place where he delivers such documents; or

(2) if the goods are at the time of contracting already identified and no documents are to be delivered, title passes at the time and place of contracting.

(d) A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance revests title to the goods in the seller. Such revesting occurs by operation of law and is not a "sale".

§2.403. Power to Transfer; Good Faith Purchase of Goods; "Entrusting"

(a) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith

purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though

(1) the transferor was deceived as to the identity of the purchaser, or

(2) the delivery was in exchange for a check which is later dishonored, or

(3) it was agreed that the transaction was to be a "cash sale", or

(4) the delivery was procured through fraud punishable as larcenous under the criminal law.

(b) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.

(c) "Entrusting" includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.

(d) The rights of other purchasers of goods and lien creditors are governed by the chapters on Secured Transactions (Chapter 9), Bulk Transfers (Chapter 6) and Documents of Title (Chapter 7).

§2.702. Seller's Remedies on Discovery of Buyer's Insolvency

(b) Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three months before delivery the ten day limitation does not apply. Except as provided in this subsection the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.

(c) The seller's right to reclaim under Subsection (b) is subject to the rights of a buyer in ordinary course or other good faith purchaser or lien creditor under this chapter (Section 2.403). Successful reclamation of goods excludes all other remedies with respect to them.

§9.107. Definitions: "Purchase Money Security Interest"

A security interest is a "purchase money security interest" to the extent that it is

(1) taken or retained by the seller of the collateral to secure all or part of its price; or

(2) taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used.

§9.312. Priorities Among Conflicting Security Interests in the Same Collateral

(c) A purchase money security interest in inventory collateral has priority over a conflicting security interest in the same collateral if

(1) the purchase money security interest is perfected at the time the debtor receives possession of the collateral; and

(2) any secured party whose security interest is known to the holder of the purchase money security interest or who, prior to the date of the filing made by the holder of the purchase money security interest, had filed a financing statement covering the same items or type of inventory, has received notification of the purchase money security interest before the debtor receives possession of the collateral covered by the purchase money security interest; and

(3) such notification states that the person giving the notice has or expects to acquire a purchase money security interest in inventory of the debtor, describing such inventory by item or type.

REPLY

BRIEF

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MICHAEL RODAK, JR.

In the

Supreme Court of the United States

OCTOBER TERM 1973

No. 73-1131

MAHON, et al.,

Petitioner,

v.

STOWERS, et al.,

Respondent.

RESPONDENTS' REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondent.

RESPONDENTS' REPLY TO PETITION FOR CERTIORARI

I.

We respectfully submit there are no special and important reasons to grant the writ (Rule 19).

The decision affects few financial institutions and few packers who buy cattle on a grade and yield basis. Ten major packers slaughter 33.5% of all cattle and 46.5% of all hogs in the United States annually. Only 22.6% of all cattle slaughtered are bought on a grade and yield basis (see Exhibits "A" and "B", attached).

II.

There are no basic conflicts in the decisions of the Court of Appeals. All of the cases cited by Petitioners in which they allege a conflict were decided prior to 1962.[1] These cases dealt with market dealers. The case at bar decided a question of law that involved the Act, 7 USCA 181, et seq., and Regulations issued thereunder, towit: 9CFR 201.43(b) and 9CFR 201.99 as they related to meat packers and cattle sellers which were placed in effect in March 1964 and July 1968 respectively (see Exhibit "B" attached). The Regulations themselves are set forth verbatim in the opinion of the Court below and can be found in the Petitioners' brief on pages 47, 48, and 49. Although the circumstances in the two *Ellingson* cases and the *Greeson* case (cited by Petitioners as conflict cases) were entirely different from the circumstances in the present case they are authority for and held that the Act at that point in time did not destroy the commercial law of the states. Neither does this case.

9 CFR 201.43(b) and 9 CFR 201.99 had not been enacted and were not before the Courts in those cases. In our case the Act and the Regulations were construed by the 5th Circuit in relation to the Commercial Law of Texas and found to be supreme under the unique circumstances of this case especially when the equities of the parties were measured and the custom and usage in the trade considered.

Therefore, we respectfully submit the decision rendered in the case at bar is not in conflict with other Appeals Court decisions.

---

[1] John Clay & Co. Livestock Commission v. Clements, et al 214 F. 2d 803 (5th Cir. 1954).

Sig Ellingson & Co. v. DeVries, 199 F. 2d 677 (8th Cir. 1952), cert. denied.

Sig Ellingson & Co. v. Butenbach, 199 F. 2d 679 (8th Cir. 1952), cert. denied.

Adams v. Greeson, 300 F. 2d 555 (10th Cir. 1962)

Mason City Production Credit Association v. Sig Ellingson & Co., 386 N.W. 713 (1939), cert. denied, 308 U.S. 599.

STATEMENT OF THE CASE

The clearest statement of the nature of the case can be found in the Referee's Certificate of Review (mimeographed Appendix, pp. 20-27). The facts have never been in dispute. We urge the Court to read the Certificate of Review.

We would add to Petitioners' Statement of the Case the following:

> For years the Petitioner C.I.T., the packer, and these Respondents had operated the same way. The packer bought the product on a grade and yield basis. He paid cash. The Referee found them to be cash sales. The packer owned nothing until the producer was paid. C.I.T. looked for its security to the paid-for carcasses, *owned* by the packer. These transactions occurred on the eve of an arrangement under Chap. XI, a voluntary petition. The sales were made immediately before the petition was filed. The packer had to pay for the carcasses before the close of business the following day or face the penalties and sanctions of the Act, 7 USCA 192(b), 193-195, §(3), and the Regulations thereunder. It was to Petitioners' best interest that the Act be followed. The product was fungible. *The Receiver sold the meat under the Court order and held the proceeds under an order of the Court until priorities could be determined.* (App. p. 21 and 26, par. 16). Prior to the voluntary petition under Chap. XI, all Respondents were issued checks for their cattle; but the checks were dishonored.

The Referee stated (App. p. 28):

"C.I.T. would impose upon the cattle sellers (Respondents) the impossible burden of tracing the proceeds of the livestock after it had been converted to meat . . . and comingled."

The Referee continued (App. p. 29):

"The transactions occurred on the eve of bankruptcy. The probabilities are, it seems to me, that at least a substantial part of the proceeds of the sale of the livestock in question found its way into the hands of the trustee and from thence to the hands of C.I.T. (Petitioner) subject to the orders of this Court. Under these circumstances, as I see it, it becomes the duty of C.I.T. to show that it did not receive the benefit of the proceeds of the sale in order to retain the funds which it received from the trustee. This it has not done."

RESPONDENTS' REPLY TO PETITIONERS' POINT 1

In the case at bar the Court construed the Texas Uniform Commercial Code in connection with the Act and Regulations lawfully issued thereunder, and in light of the circumstances of the case.

The Act is remedial legislation. The Act and the Regulations 9 CFR 201.43(b) and 201.99 consider the duty to pay that of a fiduciary, *Bowman v. USDA*, 363 F. 2d 81 (5th Cir. 1966).

See *Bruhn's Freezer Meats of Chicago, Inc. v. U.S.D.A.*, 438 F. 2d 1332 (8th Cir. 1971). In the *Bruhn's* case the Court stated:

> "Packers and Stockyards Act was framed in language designed to permit fullest control of packers . . . which constitution permits and its coverage was to encompass *complete chain of commerce* and give Secretary of Agriculture complete regulatory power over packers and all activities connected therewith." (Emphasis supplied.)

The case further held the Act was to "safeguard farmers and ranchers against receiving less than true market value of their livestock."

The Act must be liberally construed. The purpose of the Act is to protect the producer's purse. *Bowman*, supra, *Glover Livestock Co. v. Hardin*, 454 F. 2d 109 (8th Cir. 1972), *Swift & Co. v. U.S.*, 393 F. 2d 247 (7th Cir. 1968). The *Bowman* case held one of the purposes of the Act was to insure prompt payment. The *Swift* case held the Act is to be liberally construed in accordance with its purpose to prevent economic harm to producers.

9 CFR 201.43(b) brought the packer into the picture in March 1964, requiring him to pay the producer before the close of business the following day. 9 CFR 201.99, effective July 1968, requires that until the packer pays for the carcasses the carcasses be identifiably held. When the prod-

uct is sold, all identity is lost. Tracing is impossible. As stated by the Fifth Circuit "consequently the hot check provision of U.C.C. is an unavailable remedy".

This situation arose under a Court appointed receiver, an operating receiver (see App. p. 20-21). He stood squarely in the packer's shoes and was in a fiduciary relationship particularly so in light of the custom and usage in the trade as practiced by these parties, and the implied understanding or agreement extending over many years between the packer, the Respondents, and the Petitioners. In short, the Receiver (now Trustee) is a pro forma party to this case. We repeat, he sold the meat under Court order. The opinion below treats the proceeds, as did the referee, as trust funds for the benefit of Respondents.

The packer had tried to pay but its funds were shut off, resulting in returned checks.

We now examine the portion of Texas Business and Commerce Code not cited by Petitioners. Texas Business and Commerce Act (U.C.C.) § 1.102 states:

> "Purposes: (2) To permit the continued expansion of commercial practices through custom, usage and *agreement of the parties.*" (Emphasis supplied).
>
> "3(c) The effect of provisions of this title may be varied by agreement."

Section 1.205 states:

> "(c) A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement."

So, as found by the trier of fact, the parties knew or should have known of the custom and usage (see App. p. 26, par. 13). The Appeals Court held that:

> "It is clear that the Packer and Stockyards Act and Regulations 201.43(b) and 201.99 thereunder comprise a course of dealing and usage of trade known to both

the bankrupt packer and C.I.T., which had financed it for an extended period."

We would add to that Statement of the Court that the U.C.C. of Texas also takes note of custom within various trade and custom and usage in the trade can *qualify* or *supplement* the agreement. For years C.I.T. had loaned huge sums of money under the condition calling for prompt pay. It was to its interest the packer be paid.

The cases cited by Petitioners as in conflict with the instant case did not have the same facts as the instant case. Such cases dealt with the question of whether or not certain provisions of the Act overrode the Commercial Law of the States. They were decided, all of them, prior to the date 9CFR 201.43(b) and 201.99 were effective. The cases did not deal with custom and usage. The *Ellingson* cases held that a market dealer is liable in conversion to the producer if his supplier bought the animal from the producer with a worthless check, following the law of Minnesota that was to the effect that no title could be acquired by one who passed the worthless check. It did not deal with "prompt pay".

The *Greeson* case, interpreting the law of Arkansas, held the opposite. It held that one who pays with a worthless check in Arkansas and takes possession acquires a defeasible title and hence a market dealer who purchased from such person was not liable to the producer for conversion. The Fifth Circuit followed *Ellingson* in the *John Clay* case in 1954.

Our case involved the producer, the packer, its lender, and its receiver in bankruptcy who were bound by the Act and Regulations promulgated thereunder regarding prompt pay. The question of law was not the same in the cases and our case.

A 1972 case, *Glover Livestock v. Hardin*, 454 F. 2d 109 (8th Cir.) is of some interest. It reaffirms *Bowman v. USDA*, *infra*, and held the Act to be remedial legislation and admonishes it must be liberally construed. The *Bowman* case held:

> "Courts generally give great weight to construction consistently given to statute by executive department charged with its administration."

RESPONDENTS' REPLY TO PETITIONERS' POINT 2

We take issue with Petitioners' view that the opinion raises recurring problems with respect to conflicts in the Act and the U.C.C. If so, the federal law should prevail. Were the Petitioners to prevail the producer would be converted to a specie of involuntary creditor and the Act and Regulations would mean nothing. The fact that this occurred on the eve of bankruptcy changes nothing in the Act. Assume for a moment that the voluntary petition had never been filed and that the packer started violating the prompt pay provisions of the Act. Would the Petitioners have wanted an arrangement where sanctions, cease and desist orders, penalties and fines were called into play? See 7 USCA 193, 195. We think not.

Sebastopol Meat Co. v. Sec. of Agriculture, 440 F. 2d 983 (CA9, 1971), was a case interpreting the power of the Secretary under 201.43(b) and 7 USCA 192 (a), 193.

Indeed, in the *Sebastopol* case, the case law of California was urged as a defense to the right of the Secretary to impose the sanctions of the Act on a packer and its alter ego who had failed to pay a producer, but the Court held the Act and this specific regulation (201.43(b) to control and be supreme under the circumstances of that case.

As stated by Justice Ingraham:

> "These regulations had binding effect on Samuels, whose compliance therewith permitted it to continue its operations."

He further stated, referring to the cases cited in the majority opinion:

> "The reasoning of these cases and the impact of the Packers and Stockyards Act convinces this Court that more than an unperfected security interest subject to reclamation is reserved to the cattle seller."

CONCLUSION

We respectfully repeat that no special and/or important reason exist to grant the writ.

We respectfully submit that there are no conflict of decisions of such impact as to justify the writ.

If the Act and Regulations thereunder and the U.C.C. are in para materia, then the equities weigh heavily with the Respondents. We submit the Act is supreme based on these undisputed facts.

We respectfully urge the Court to deny the petition for Writ of Certiorari.

Respectfully submitted,

HOLLEY & HOLLEY,
2630 Republic National Bank
Tower Bldg.,
Dallas, Texas 75201,

By Grady Lamar Holley
Grady Lamar Holley
Attorneys for Respondents.

CERTIFICATE OF SERVICE

I certify that on the 14 day of February 1974 there was delivered to Counsel for Petitioner at his office three printed copies of this reply.

Grady Lamar Holley

Grady Lamar Holley

EXHIBIT "A"

UNITED STATES DEPARTMENT OF AGRICULTURE
PACKERS AND STOCKYARDS ADMINISTRATION
819 Taylor—Room 7A15
Fort Worth, Texas 76102

January 24, 1974

Mr. Lamar Holley
1831 Republic National Bank Bldg.
Dallas, Texas 75201

Dear Mr. Holley:

Per your request, the following information was obtained from the Industry Analysis Staff of the Packers and Stockyards Administration in Washington:

PERCENTAGE OF THE TOTAL U.S. COMMERCIAL SLAUGHTER DONE BY THE TEN MAJOR SLAUGHTERERS IN 1972

	CATTLE	*HOGS*
Percentage —	33.5	44.6
Ten Packers By Head Count —	11,997,000	37,742,000
Total Comm. By Head Count —	35,779,000	84,707,000

If any further information is required, please let me know.

Sincerely,

/s/ M. L. MARSHALL

M. L. Marshall
Area Supervisor

EXHIBIT "B"

UNITED STATES DEPARTMENT OF AGRICULTURE
PACKERS AND STOCKYARDS ADMINISTRATION

819 Taylor — Room 7A15
Fort Worth, Texas 76102

January 29, 1974

Mr. Lamar Holley
1831 Republic National Bank Bldg.
Dallas, Texas 75201

Dear Mr. Holley:

Pursuant to your request, I have assembled the following information:

Regulation 201.43(a) was Regulation 17(a) in the original regulations promulgated in 1921. At that time, the regulation read as follows: "Each market agency shall, before the close of the next business day following the sale of any livestock consigned to it for sale, transmit or deliver to the owner or consignor of the livestock a true written account of such sale, showing the number, weight, and price of each kind of animals sold, the name of the purchaser, the date of sale, and such other facts as may be necessary to complete the account." The designation was changed to number 11 in 1942, and the current 201.43(a) was issued in July 1954.

Regulation 201.43(b) requiring that livestock be paid for by the close of the next business day was promulgated in March 1964. Regulation 201.43(b) was amended March 15, 1971, to read in its present form.

Regulation 201.43(c) requiring that purchasers promptly reimburse their agents was effective in April 1965.

Regulation 201.99, the purchase of livestock by packers on a carcass grade, carcass weight, or carcass grade and weight basis, was made effective in July 1968.

The Packers and Stockyards Administration's Resume published December 14, 1973, included on Page 24 a table 12 entitled "Livestock purchased on Carcass Grade and Weight by type of Packer — 1963 to 1972." The table showed that cattle purchased on a grade and weight basis made up 22.6% of all of the cattle purchased by all of the packers (317) reporting to the Administration. I am enclosing a copy of Regulation 201.43(a), (b), and (c) in its present form and a copy of the Packers and Stockyards' Resume, Volume 11, No. 13, for your use.

If we can be of any further assistance, don't hesitate to call upon us.

Sincerely,

/s/ M. L. MARSHALL

M. L. Marshall
Area Supervisor

Enclosures